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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners submit this reply brief pursuant to Rule 24.5 of the Rules of the Supreme Court to address an argument first raised by respondents in opposition to the petition for a writ of certiorari.

Respondents claim that "[t]he entire Petition is predicated on the stipulation that 'all of the insurance companies which were available to Arizona to provide life annuities used . . . sex-based mortality tables'" but that "[i]n truth . . . the parties stipulated only that all companies *designated by the Arizona Governing Committee* as funding media use gender-based actuarial tables."

Respondents' statement is incorrect. To the contrary, the Joint Stipulated Statement of Facts, upon which the judgments below were based, stated without qualification:

> "All [actuarial] tables presently in use provide a larger sum to a male than to a female of equal age, account value and any guaranteed payment period."

Joint Stipulated Statement of Facts, p. 8

Indeed, respondents' counsel at the hearing on the motions for summary judgment in the district court admitted that he was unaware of any insurance company which did not use sex-based actuarial tables:

> "MR. MEYERSON: I do not know whether in the State of Arizona there is a carrier who is prepared to offer a plan that would be required if the Court would rule in favor of plaintiff's motion."

October 22, 1979 hearing, p. 11[1]

Moreover, it was respondents who had the burden of proof to demonstrate that petitioners could have contracted with an insurance company that used unisex mortality tables. *See Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981). Since respondents failed to identify even one such company (and indeed none exists), they cannot now claim that petitioners could have acted otherwise than they did. Petitioners had no choice but to offer life annuities based on sex-based actuarial tables, if they were to offer them at all.

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[1] Indeed, the amicus brief of the American Council of Life Insurance ("ACLI"), submitted to the Ninth Circuit, stated that it knew "of no private insurance company offering annuities to the general public and doing business in Arizona, or anywhere else, either today or in 1972 . . . that offers an annuity which does not calculate benefits in accordance with sex-based actuarial tables." (ACLI brief, p. 22 n. 32) *See Equal Employment Opportunity Commission* v. *Colby College,* 589 F.2d 1139, 1145 (1st Cir. 1978).

In any event, our "entire" petition was not "predicated" on our reading of the stipulation on that one fact. The court of appeals' opinion poses other important questions relating to the reach of the Court's decision in *Manhart* which this Court should settle: The extension of *Manhart* to impose liability on an employer for the practices of private insurance companies, the application of *Manhart's* open market exception, whether proof of intent to discriminate is necessary, and the relationship between the Tenth Amendment and the Fourteenth Amendment. Petitioners therefore request that a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit.[2]

Respectfully submitted,

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[2] Petitioners do not believe it is appropriate to address the other misrepresentations in respondents' brief pursuant to Supreme Court Rule 24.5. However, one misrepresentation of the law is so egregious that petitioners cannot overlook it. The decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), only held that an imposition against a *private* company of attorneys' fees which are not authorized under state procedure does not violate the Tenth Amendment where authorized pursuant to congressional power under Section 5 of the Fourteenth Amendment; it did not "unequivocally" resolve the relationship between the Fourteenth and Tenth Amendments, as respondents urge at p. 8 of their brief.